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Paper No.

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MAILED

AUG 19 2010

OFFICE OF PETITIONS

In re Application of :
Brodbeck et al. :
Application No. 10/648,759 : ON PETITION
Filed: August 25, 2003 :
Atty Docket No. ARC 2882 N1 :
(3139-6225.1U) :

This is a decision on the PETITION FOR REVIVAL OF AN APPLICATION FOR PATENT ABANDONED UNAVOIDABLY UNDER 37 CFR 1.137(a) filed September 15, 2008.

The petition is DISMISSED.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)," as appropriate. Extensions of time under § 1.136(a) are permitted.

The above-identified application became abandoned for failure to file a proper reply to the final Office action mailed December 13, 2007. This Office action set a shortened statutory period for reply of three (3) months, with extensions of time obtainable under § 1.136(a). A reply was filed on February 13, 2008. However, it was determined not to place the application in condition for allowance (See Advisory Action sent June 6, 2008). No further reply filed and no extension of time obtained, the application became abandoned effective March 14, 2008. A courtesy Notice of Abandonment was sent on August 12, 2008.

In response, assignee Durect Corporation, filed the instant petition, requesting revival pursuant to 37 CFR 1.137(a). Accompanying this petition was a statement under 37 CFR 3.73(b) and revocation of power of attorney with a new power of attorney. Petitioner maintains that the required showing of unavoidable delay is met because (A) a docketing error is the cause of the delay at issue, (B) docketing of responses due in files prosecuted by the undersigned before the USPTO is a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance and (C) the employee entrusted with the docketing function is highly trained and experienced such that reliance on the performance of that employee represents the exercise of due care. Further, petitioner argues that the delay was discovered the day before the filing date of this petition, so the entire period of the delay was unintentional.

As agreed by petitioner, the unavoidable delay standard:

requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them, in the exercise of this care, to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all the other conditions of good faith and promptness in its ratification being present.

Under this standard, a prudent and careful man in ensuring the timely filing of a response to an Office action may rely on a worthy and reliable employee to perform a clerical function. Specifically, a delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that:

- (1) the error was the cause of the delay at issue;
- (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and

(3) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care.

Thus, in order to meet the burden of showing that the delay was unavoidable based on docketing error, applicant must specify the error that was the cause of the delay at issue; specify the business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance, with respect to the error that occurred; and specify the employee and show that that employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. Here, applicant generally describes business routine, does not specify error and how it occurred, and does not specify docketing specialist who committed the error. As such, it cannot be concluded that petitioner has met his burden of establishing that the delay was unavoidable within the meaning of 1.137(a).

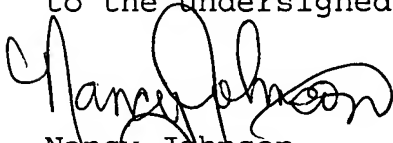
Further correspondence with respect to this decision should be addressed as follows:

By mail: Mail Stop Petition
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By fax: (571) 273-8300
 ATTN: Office of Petitions

By hand: Customer Service Window
 Randolph Building
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Telephone inquiries related to this decision should be directed to the undersigned at (571) 272-3219.



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